No. 473

In the Supreme Court of the United States

OCTOBER TERM, 1950

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, PETITIONER

v.

ROBERT D. ELDER AND GERTIE CHANDLER FURMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

INDEX

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OPINIONS BELOW

The memorandum opinion of the District Court (R. 72) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 88) is reported at 184 F. 2d 219.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1950 (R. 96). A petition for rehearing, filed on June 30, 1950 (R. 97), was denied on October 2, 1950 (R. 100). The petition for a writ of certiorari in No. 473 was

filed on December 29, 1950. Certiorari was granted on February 26, 1950. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether under the Veterans' Preference Act of 1944 the reemployment rights of veterans properly separated from their positions in federal service are governed by the reduction-in-force regulations under Section 12 of the Act, rather than by Section 15 which deals specifically with preference in reemployment.

STATUTE AND REGULATIONS INVOLVED

Pertinent portions of the Veterans' Preference Act of 1944 (58 Stat. 387, 5 U. S. C. and 5 U. S. C., Supp. III, 851 *et seq.*) and of the Regulations of the Civil Service Commission are set forth in the Appendix (*infra,* pp. 27–45).

STATEMENT

These actions were brought by respondents, honorably discharged veterans entitled to the benefits of the Veterans' Preference Act of 1944, 58 Stat. 387 (Appendix, *infra,* pp. 27–32) (R. 3, 77), for mandatory injunctions to restrain their separation from the Department of Agriculture and for declaratory judgments (R. 2–7, 76–82). Amended and supplemental complaints alleged the violation of respondents' rights in the retention and reemployment of other employees (R. 52–53).

1. For the purposes of the present case (No. 473), the undisputed facts are as follows: In September, 1942, respondents took and passed the Federal Civil Service Legal Examination and their names were placed on the Civil Service Register of Attorney Eligibles (R. 3, 77). In July and August of 1943, respondents entered federal service in the positions of associate attorneys (Grade P–3) in the Office of the Solicitor of the Department of Agriculture (R. 3, 77). At the time respondents entered federal service all appointments to attorney positions were governed by Section 17.1 (g) of the Regulations of the Board of Legal Examiners (8 F. R. 5208, 5 C. F. R. Cum. Supp. 1457) promulgated under the authority of Executive Order No. 9063, February 16, 1942 (7 F. R. 1075, 3 C. F. R. Cum. Supp. 1093).[1] Executive Order No. 9063 had authorized the Civil Service Commission to prescribe such special procedures as it deemed necessary for the recruitment of personnel by all federal agencies during World War II and provided that persons appointed under such procedures would not acquire classified (competitive) civil service status. Section 17.1 (g), promulgated on April 19, 1943, in turn provided that *all* appointments

[1] The regulations were adopted by the Legal Examining Section of the Civil Service Commission which succeeded the Board of Legal Examiners. E. O. No. 9358, June 20, 1943, 8 F. R. 9175; Civil Service Acts, Rules and Regulations, annotated (amended to October 31, 1943), p. 171.

as attorneys were to be limited to the duration of the present war and for six months thereafter" and that persons so appointed would not "thereby acquire a classified Civil Service status." Respondents' appointments were, consequently, limited to the duration of the war and six months thereafter (R. 41–43) and they did not acquire competitive status.[2] On May 29, 1947, together with eighteen other attorneys, they were notified that, pursuant to a reduction-in-force necessitated by a shortage of funds, they would be separated from the service effective June 30, 1947 (R. 8, 70, 71). The separation was effected in due course (R. 60).

The reduction-in-force was carried out in accordance with the Civil Service Commission Retention Preference Regulations. Those regulations provide, in general, that, for purposes of determining the order in which separation shall be effected, employees shall be divided into three groups—A, B and C—according to tenure of employment. Group A, which has the highest retention priority, is composed of employees with competitive status or, in the case of positions such as that of attorney which are "excepted" from examination requirements, who hold appointments without time limitation. Group B, which has the second highest priority, is composed of

[2] In our brief in No. 474, we discuss respondents' contention that they acquired competitive status. In this case (No. 473), we assume, as the Court of Appeals and the District Court held, that they did not have such status.

employees without competitive status or whose appointments are limited to the duration of the war and six months. Group C has the lowest priority and is composed of employees whose appointments are limited in time to one year or less. Within each group employees are further divided into sub-groups according to veterans' preference and efficiency rating. Thus, sub-groups A–1, B–1 and C–1 are composed of employees with veterans' preference and efficiency ratings of "good" or better, and sub-groups A–2, B–2 and C–2 are composed of employees without veterans' preference with "good" or better efficiency ratings.[3] In accordance with those regula-

[3] The Civil Service Commission "Retention Preference Regulations for use in Reductions in Force," 12 F. R. 2850, § 20.3 provided: "For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

"*Group A.* All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of 30 days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

"A–1 Plus during one-year period after return to duty, as required by law.

"A–1 With veteran preference unless efficiency rating is less than 'Good'.

tions, respondents were classified in Group B, as employees without competitive status holding appointments limited to the duration of the war and six months. They were further classified in sub-group B–1 (R. 44) as veterans with efficiency ratings of at least "good". All of the attorneys retained in the Office of the Solicitor of the Department of Agriculture ranked higher on the retention register; at least some of them were non-veterans with the equivalent of competitive status and classified in sub-group A–2.

Respondents appealed their separation to the Civil Service Commission under Section 14 of the Veterans' Preference Act of 1944 (R. 33). The Commission found (on July 14, 1947, and October 23, 1947) that the action had been taken in conformity with its reduction-in-force regulations and denied the appeals (R. 34, 63). On June 5, 1947, while the appeals to the Commission

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"A–2 Without veteran preference unless efficiency rating is less than 'Good'.

* * * * *

"*Group B.* All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

"B–1 With veteran preference unless efficiency rating is less than 'Good'.

"B–2 Without veteran preference unless efficiency rating is less than 'Good'."

* * * * *

The definition of Groups A and B were modified, in respects not material here, on July 4, 1947 (12 F. R. 4365), and, as amended, are set forth in the Appendix, *infra*, pp. 36–37.

were pending, respondents instituted these actions (R. 2, 76).

Some time subsequent to the separation of respondents, additional funds became available to the Department of Agriculture and were allotted to the Office of the Solicitor, and several attorneys who had not been reached for separation resigned (R. 71). Neither of those events could have been foreseen at the time of respondents' separation (R. 72). Thereupon, the Solicitor reemployed nine attorneys, including one veteran, the first of whom took office on October 27, 1947, five months after respondents' notice of separation (R. 72). Several of the attorneys rehired had been separated at the same time as respondents but with inferior positions (sub-group B–2) on the retention register (R. 52). The nine attorneys were selected on the basis of training and experience and their particular suitability for the positions they were to fill (R. 72).

2. Respondents brought these suits claiming in their original complaint (R. 2), filed June 5, 1947, that their preferential rights to retention were violated when non-veterans were continued in employment (R. 5). They asked for a declaratory judgment that their separation notices were invalid and for an injunction against their separation (R. 7). By an amended complaint, filed June 24, 1947 (R. 13), they alleged that they had acquired competitive status (R. 15) and asked, in

addition to the relief previously requested, for a declaratory judgment that they had acquired such status (R. 25) and a mandatory injunction restoring them to their former positions (R. 24). On August 15, 1947, the Secretary[4] moved for summary judgment on the ground that respondents had not acquired competitive status and had been separated in accordance with applicable civil service regulations (R. 32). On March 8, 1948, respondents filed an "Amended and Supplemental Complaint" (R. 49) in which they alleged that the reemployment of the B–2 attorneys separated with them (*supra*, p. 7) was a violation of their rights. It is not at all clear whether respondents intended to allege the reemployment of the B–2 attorneys as a violation of their reemployment rights, or as a violation of their retention rights on the theory that the reduction-in-force was not made in good faith.[5] In any event, the argument

[4] The Secretary of Agriculture is petitioner in No. 473 and respondent in No. 474. To avoid confusion he is referred to as "the Secretary," in both this brief and that in No. 474.

[5] Nowhere in paragraphs 29–35 of the "Amended and Supplemental Complaint," which were relied on by the Court of Appeals as sufficient allegation of violation of reemployment and reinstatement rights, do the words "reinstatement" or "reemployment" appear. On the other hand, Paragraph 35 seems to contain a specific allegation that the reduction-in-force was not in good faith, and paragraph 33 alleges the reemployment of B–2 attorneys as a violation of respondents' retention rights. The allegation that the reduction-in-force was not in good faith is manifestly frivolous and has not been urged in this Court in No. 474, nor was it urged in the Court of Appeals. The budget of the Solicitor's Office was

before the District Court was concerned only with the questions of respondents' retention rights and their competitive status.

The Secretary renewed his motion for summary judgment (R. 69) and also moved to strike from the "Amended and Supplemental Complaint" the paragraphs in which respondents alleged the reemployment of B–2 attorneys as a violation of their rights. The District Court, in an informal memorandum, found that respondents did not have permanent civil service status, and had been separated "in full compliance with the applicable statutes and regulations", and granted the Secretary's motion for summary judgment (R. 72). The District Court did not act on the Secretary's motion to strike, and apparently did not consider any question of discrimination in reemployment. Similarly on appeal, the only issues argued and briefed pertained to respondents' status and the validity of their separation and not to their reemployment rights.

The Court of Appeals agreed that respondents did not have competitive status and that their separation was proper (R. 90–92), but it reversed the decision below on the ground that Section 2 and the reduction-in-force regulations

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cut more than 10%, and, during the course of 1947, 60 attorneys were discharged and more down-graded. The attorneys discharged included all but one "B" group attorney (a P–8) and a large number of A group attorneys.

under Section 12 of the Veterans' Preference Act of 1944 created rights to "reinstatement and reemployment" which "were violated * * * when other attorneys, classified in a lower subgroup than B–1, who had been released with [them], were reemployed" (R. 93). Since the district court had granted the Secretary's motion for summary judgment, the cases were remanded for determination of the single factual issue of the reemployment of the B–2 attorneys (R. 95).

The Government filed a petition for a rehearing (R. 97) on the ground that the issue of reemployment had not been argued by the parties and that the scope of reemployment preference was prescribed in Section 15 of the Act, which had not been briefed by the parties or discussed by the Court, and not by Section 2 or Section 12. The petition requested the Court, in the event rehearing was not desired, to modify its opinion to direct the District Court to hear only the question of compliance with the statutory provisions and regulations dealing with reemployment preferences (R. 99). The petition for rehearing was denied (R. 100).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia Circuit erred:

1. In holding that Section 2 of the Veterans' Preference Act of 1944, without more, conferred specific preference benefits.

2. In holding that respondents' preference in reemployment and reinstatement was violated when persons lower ranking on the *retention* register were reemployed.

3. In holding that veterans' preference in reemployment is to be measured by the standards established for retention in employment under Section 12 of the Act rather than by the standards of Section 15 dealing specifically with reemployment.

4. In failing to consider Section 15 of the Act in determining the scope of preference in reemployment.

5. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

Relying upon the general language of Section 2 of the Veterans' Preference Act (*infra*, p. 27), to the effect that "preference shall be given" honorably discharged veterans "in certification for appointment, in appointment, in reinstatement, in reemployment, and in retention," as granting specific preference benefits, the court below applied the standards of the Civil Service Commission's *reduction-in-force* regulations under Section 12 (*infra*, p. 30) as the measure of the veterans' *reemployment* rights. In reaching its decision, the court completely ignored Section 15 of the Act (*infra*, p. 31) where Congress carefully delimited the scope of the veterans' reemployment rights. The effect of the

holding is to substitute for the statutory and administrative measure of veterans' reemployment rights the completely different standards established by statute and regulation with respect to retention in employment.

The basic error leading the Court of Appeals to this anomalous result is its failure to recognize that Section 2 does not confer specific preference benefits. That provision does no more than declare a general policy and enumerate the classes of persons to whom, and the classes of situations in which, "preference" is to be accorded. The later sections of the Act prescribe the scope of the "preference" in the various employment situations, such as appointment, retention, or reemployment, and authorize the Commission to administer and enforce these rights. Section 2 certainly does not permit the courts to draw new and additional rights, not authorized by Congress or the Commission, out of the general phrase "preference shall be given."

In addition to misreading the statute and misapplying the regulations, the decision of the court below upsets long-standing policies of the Civil Service Commission and introduces uncertainty and confusion into the administration of federal employment.

ARGUMENT

Respondents contend in No. 474 that they were improperly separated and make several argu-

ments to support their position. We shall answer those arguments in our brief in that case. For the purposes of our argument here we assume, in accordance with the holding of the court below, that they were properly separated, and consequently direct our argument solely to the question of their reemployment rights. We contend that respondents' preference in reemployment depends exclusively on Section 15 of the Veterans' Preference Act and the Civil Service regulations promulgated under Section 15, and that any rights respondents may have by virtue of Section 12 relate only to separation during a reduction-in-force, and, accordingly, are not relevant here. Since there has been no allegation that their rights under Section 15 were violated, nor any consideration of that section by the courts below, we submit that the judgment of the Court of Appeals was erroneous.

I

SECTION 2 OF THE VETERANS' PREFERENCE ACT MERELY DECLARES A POLICY OF PREFERENCE AND DOES NOT, WITHOUT REFERENCE TO SUBSEQUENT SECTIONS, GRANT SPECIFIC PREFERENCE BENEFITS

Section 2 of the Veterans' Preference Act (*infra*, p. 27) which the court below assumed conferred specific preference benefits, does no more than declare a general policy of preference and enumerate the classes of persons to whom, and the classes of situations in which, preference is to be given. See *Mitchell* v. *Cohen*, 333 U. S.

411.[5] The structure of the statute makes unmistakably plain the intention of Congress, first in Section 2, to describe the persons entitled to its benefits, and, then, in subsequent sections, to prescribe the scope of "preference" in the various employment situations. Throughout the legislative history of the Act, Section 2 was regarded as simply "defining the various groups to whom preference [was] to be granted." H. Rep. No. 1289, 78th Cong., 2d Sess., p. 3; Sen. Rep. No. 907, 78th Cong., 2d Sess., p. 2.[7] Discussion of Section 2 was concerned solely with the groups to be given preference.[8]

The later sections of the Act define the substance of "preference" with respect to appointment, retention, reinstatement and reemployment.

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[5] In the analogous situation prior to the passage of the 1944 Act it was occasionally contended that the existing statutes, which like Section 2 declared a general policy of preference, gave veterans an absolute right to be employed and retained. The contentions were rejected. *Keim* v. *United States*, 177 U. S. 290 (inefficient veteran may be discharged); *Love* v. *United States*, 108 F. 2d 43, 46–48 (C. A. 8), certiorari denied, 309 U. S. 673.

[7] Substantially identical language was used by Representative Starnes, the author of the bill, in explaining the bill in the House, 90 Cong. Rec. 3503, 78th Cong., 2d Sess., and during the Senate hearings on the bill. Hearings before the Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess., p. 9.

[8] For example, the so-called LaFollette amendment which would have extended derivative preference to husbands of service-disabled women. Such a provision was included in the House version but was removed by the Senate. 90 Cong. Rec. 5784–5, 78th Cong., 2d Sess.

Under the statutory scheme, Sections 7 (*infra*, p. 28) and 8 (*infra*, pp. 28–30) prescribe the preference to be accorded a veteran in certification for appointment and reappointment, Section 12 (*infra*, pp. 30–31) in retention, Section 13 (*infra*, pp. 31–32) in reinstatement after resignation, dismissal or furlough, and Section 15 (*infra*, p. 31) in reemployment after separation without fault.[9] The extent of preference afforded veterans by the various sections is different for each employment situation involved.

Under Sections 7 and 8, governing original appointment, the veteran is entitled to have five points, or in the case of a disabled veteran ten points, added to his score on examination. His name is then placed on the appropriate civil service register in accordance with his augmented rating. When an appointing officer wishes to fill

[9] The other sections of the Veterans' Preference Act deal with the following matters: Section 1—title; Section 3—additional credits, on examinations, for veterans; Section 4—credit for military service; Section 5—waiver of physical and educational qualifications; Section 6—exemption of veterans from restrictive laws as to geographical apportionment, etc.; Section 9—selection of veterans in the unclassified civil service; Section 10—periodic examinations to be held by the Civil Service Commission; Section 11—Civil Service Commission to issue rules and regulations; Section 14—procedure on discharge or separation of veterans; Section 16—rights of preference eligibles who have resigned; Section 17—definition of "Civil Service Commission"; Section 18—repeal of inconsistent laws; Section 19—Civil Service Commission to make and enforce rules; Section 20—separability provision. See 5 U. S. C. 851–869.

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a position he notifies the Civil Service Commission which certifies to him at least three names from the top of the register. The appointing officer must appoint one of the three persons so certified but need not choose the eligible whose name is first on the list even if the latter is a veteran. If, however, he passes over a veteran in favor of a non-veteran he must furnish, in writing, to the veteran and the Commission a statement of his reasons for passing over the veteran. The Commission must pass on the sufficiency of those reasons.

Section 12 provides that in a reduction-in-force veterans with efficiency ratings of "good" or better shall be retained in preference to *competing* employees. The areas of competition are left to Civil Service regulations "which shall give due effect to tenure of employment, military preference, length of service and efficiency ratings." Section 13 provides that a preference eligible who has resigned or been dismissed or furloughed *may* be appointed to any position in the federal service for which he is eligible. The preference in reinstatement afforded a veteran under Section 13 is that he may be reinstated without regard to time limitations, which is not true in the case of non-veterans. Section 15, governing reemployment, provides that, upon application, a veteran who has been separated without fault is to have his name placed on all registers and/or employment lists for which he has eligibility.

He is then to be appointed in accordance with the provisions of Sections 7 and 8 governing original appointment, provided that where a reemployment list contains the names of three or more preference eligibles, no appointment, except of a ten-point preference eligible, may be made from an examination roster.

The extent of preference in a particular situation, therefore, cannot be determined without reference to the appropriate sections of the Act, and reemployment rights cannot be ascertained by examining the standards for retention preference promulgated under Section 12. In holding that Section 2, by itself, confers preference benefits—without regard to the later specific provisions of the Act—the Court of Appeals unnecessarily opens the door to boundless confusion in the entire field of veterans' preference in the federal service. If the definition of the scope of "preference" is not to be found in the sections dealing with the particular aspects of employment, or if Section 2 is held to grant benefits over and above those allowed by or under the specific provisions, the Civil Service Commission, the employing agency, and the veteran himself can have no reliable guide to the meaning of "preference" in a particular situation. A series of supposed preference rights will be drawn out of the general terms of Section 2, and the courts will presumably have to pass upon each

claim, without light from Congress or the Commission. It seems plain, however, that, far from being designed as a declaration of "preference" policy to be implemented by the courts, the Veterans' Preference Act, as a whole, was intended to be, in part, a detailed code of preference rights, and, in part, an authorization to the Civil Service Commission to add to, and further define, those rights. The statute was the culmination of a long history of Congressional and administrative concern with veterans' rights in the civil service, and was enacted against that background. It would be most astonishing, therefore, if the general and introductory phrases of Section 2 were designed to authorize the courts to erect and establish, without legislative or executive guidance, new and additional preference rights.[10] See also, Point III, *infra*, pp. 24–26.

The vice of the decision below that Section 2, without more, confers specific preference benefits is perhaps best illustrated, in the present case, by the confusion which has arisen with respect to *reinstatement* rights. The Court of Appeals

[10] In *Hilton* v. *Sullivan*, 334 U. S. 323, neither the Court nor the Government relied on Section 2 as indicating the type of preference to which veterans were entitled in retention in government service and in the working-out of a reduction-in-force. Instead, the nature and scope of the veterans' preference was drawn from Section 12 of the Veterans' Preference Act (dealing with reductions-in-force) and, in part, from Section 8 of the Selective Training and Service Act of 1940.

seems to have regarded reinstatement and reemployment as synonymous; at least, it did not attempt to define either term or differentiate between them. Respondents assert that because Section 2 declares that veterans shall be entitled to preference in reinstatement, and because neither Section 13 nor any other section except Sections 2 and 5 use the word "reinstatement", they are entitled to absolute preference in reinstatement, which they interpret to mean restoration to the jobs from which they were separated. In fact, *reinstatement,* as the word is used in connection with the civil service, is a type of reemployment available only to persons with competitive status. See Civil Service Regulations, Part 7, "Reinstatement," 5 CFR (1949) Part 7 (*infra,* pp. 35–36); Federal Personnel Manual, p. Z1–245. Reinstatement is defined in the Federal Personnel Manual, p. R1–9, as "Reemployment authorized under Part 7 of the Regulations, *on the basis of appointee's competitive status.* [It] also includes reemployment of *employees with competitive status* as a result of appeal from separation, or under CS Reg. 20.9, 20.13, or 20.14." (Italics added.) Since respondents did not have competitive status, reinstatement was not available to them; moreover, the position of attorney is an "excepted" position and appointments of attorneys are not filled by reinstatement. In any case, the preference in reinstatement given by

Section 13 of the statute is that a veteran *may* be reinstated without regard to time limitations, whereas under Part 7 of the Civil Service Regulations reinstatement of non-veterans can only be made within rigid limits (*infra,* pp. 35–36). Whether or not an employee will be reinstated is completely within the discretion of the appointing officer. 24 Op. Atty. Gen. 103, August 27, 1902. Finally, reinstatement does not necessarily mean, and in fact rarely does mean, that an employee is restored to the position from which he resigned or was separated, but simply that a person with competitive status, by virtue of that status, may be appointed to any position in the service for which he is eligible.

It is, then, meaningless to speak of "absolute preference over non-veterans" in reinstatement. Each reinstatement action is discretionary and no employee, veteran or non-veteran, with or without competitive status, has an absolute right to be reinstated. Preference in reinstatement can, therefore, only take the form of a more relaxed standard of eligibility for reinstatement. It is only by restricting the inquiry, as do respondents, to a consideration of Section 2 that it is possible to confuse eligibility for reinstatement with the more substantial rights to reemployment. The sum of respondents' rights to be rehired are contained in Section 15 which specifically deals with the treatment that *must* be accorded a veteran "separated without delinquency or misconduct" on his part.

II

RESPONDENTS' RIGHTS TO BE REHIRED MUST BE TESTED AGAINST THE STATUTORY STANDARD OF SECTION 15, DEALING WITH REEMPLOYMENT, RATHER THAN SECTION 12, DEALING WITH REDUCTION-IN-FORCE.

Once respondents were properly separated in accordance with the procedures specified by the Civil Service Commission's Retention Preference Regulations,[11] their rights to be rehired depended on Section 15, which deals specifically and exclusively with the reemployment preference to be accorded veterans who, like respondents, have been separated from the service without misconduct or delinquency on their part.[12]

The rights of a veteran under Section 15, and the Civil Service Regulations promulgated thereunder, are clearly defined. Since respondents are attorneys, their reemployment rights are governed by Part 21 of the Civil Service Regulations, "Appointment to Positions Excepted from the Competitive Service" (*infra*, pp. 39–45).[13] Under Section 21.6 (b) (1) of those regulations, respondents were entitled, upon request, to have their

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[11] As stated above (p. 9), both the Court of Appeals and the District Court held that respondents were properly separated under these regulations, and in this brief we assume that to be the case. In our brief in No. 474, we show that the lower courts were correct in this conclusion.

[12] The provisions of Section 7 and 8 dealing with original appointments are incorporated by reference in Section 15.

[13] Similar provision is made for reemployment in competitive positions. 12 F. R. 2832, 5 C. F. R. § 2.107.

names placed on the reemployment list of the agency from which they were separated. The regulations provide (Section 21.5) for a numerical rating of applicants for a position based on an evaluation of their qualifications. In the case of veterans the numerical rating is augmented by five points, or in the case of disabled veterans, ten points. The rank of veterans on a reemployment list is determined by their augmented ratings. Applicants for a position are then to be considered in the order of their rank on the reemployment list. As in original appointment, the appointing officer may consider the three highest ranking names on the list for any vacancy and may pass over a veteran in favor of a non-veteran. If he does pass over the veteran he must inform the veteran, if requested, of the reasons for doing so.

Thus, the veteran's right to reemployment under Section 15 is a very different thing from the absolute preferential right to which respondents are entitled under the holding of the court below. In reaching its decision, the court below completely ignored Section 15. Instead, it held respondents' rights were violated when they were not rehired in inverse order of their discharge. In effect, the court below substituted for the statutory and administrative measure of veterans' reemployment rights the completely different

standards established by statute and regulation with respect to retention in employment.

Section 12, on which the Court of Appeals relied (R. 91–92), relates only to personnel reductions and the Commission's reduction-in-force regulations, issued specifically under the authority of Section 12, deal exclusively with retention preferences.[14] 9 F. R. 9575; 9 F. R. 13699; 5 C. F. R. (1949) 20.1 *et seq.* (*infra,* pp. 36–38). See *Hilton* v. *Sullivan,* 334 U. S. 323. The rank of respondents, and of the "B–2" attorneys rehired, on the retention register is irrelevant to the question of respondents' reemployment rights. The system of preferences for discharges established by the statute and implemented by the regulations bears no resemblance whatever to that established for reemployment. There is no basis in the statute, or the regulations, for substituting the preferences created in the one employment area for those established in the other. Had the court below tested the respondents' reemployment rights against the statutory standards for reemployment, it would necessarily have reached an opposite result. For there has been no finding, or even an allegation, that the provisions of Section 15 were not followed in these cases.

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[14] These regulations are described *supra*, pp. 4–6. From their terms, it is plain that they do not apply to reemployment or reinstatement.

III

THE DECISION BELOW OVERRIDES LONG STANDING REGULATIONS OF THE CIVIL SERVICE COMMISSION AND SUBSTITUTES A JUDICIAL SYSTEM OF PREFERENCE REGULATION NOT SANCTIONED BY THE STATUTE

The Veterans' Preference Act was intended, in large part, as a codification of existing Executive Orders and Civil Service Regulations. See H. Rep. No. 1289, 78th Cong., 2d Sess., p. 3. Sen. Rep. No. 907, 78th Cong., 2d Sess., p. 1; 90 Cong. Rec. 3505. The Act was, it is true, intended to strengthen veterans' preference in several respects, see *Hilton* v. *Sullivan,* 334 U. S. 323, 337, but each enlargement of veterans' rights was carefully noted in the legislative history. Prior to passage of the Act, the kind of preference for which respondents' contend had never existed, and there is nothing in the legislative history which suggests that Congress intended to confer absolute preference in reemployment or to require the Commisison to assimiliate reemployment preference to reduction-in-force preference.[15]

Moreover, the Civil Service Commission was empowered by Section 11 "to promulgate ap-

[15] In explaining Section 15 to the Senate Committee on Civil Service, Mr. Arthur S. Flemming, Civil Service Commissioner, simply said: "Section 15 deals with the establishment of reemployment lists. We have had reemployment lists in the Federal Civil Service for about twenty-five years." Hearings, *supra*, note 7, at p. 30.

propriate rules and regulations for the administration and enforcement of the Act." Pursuant to that power, the Commission has established a comprehensive system of regulations governing veterans' preference in the civil service. Those regulations prescribe in detail the preferential treatment to be accorded veterans in all aspects of employment. Nowhere in the regulations has the Commission provided for absolute preference of veterans over non-veterans. Except in the case of retention (*supra*, pp. 4–6), the regulations do not attempt to prescribe completely the order in which employees are to be affected by personnel actions. Instead, the Commisison has left a certain amount of discretion in appointing officers to choose between a number of eligibles, provided only that if he passes over a veteran he must be prepared to justify his doing so. *Supra*, pp. 15–17, 18–20, 21–22, 23; *infra*, pp. 32 *et seq.*

The Commission's regulations are, of course, entitled to great weight as aids to interpretation of the Veterans' Preference Act, *United States* v. *American Trucking Associations*, 310 U. S. 534. More importantly, however, as regulations of the agency specifically authorized by Section 11 to promulgate regulations and to administer the Act, they must be upheld unless plainly erroneous. *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501, 503; *Helvering* v. *Wilshire*

Oil Co., 308 U. S. 90, 102–103; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413–414. By using the reduction-in-force regulations as a yardstick of reemployment rights, the court below has, in effect, substituted the judiciary for the Commission as the administrator and enforcer of the statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed and the judgment of the District Court affirmed, or, in the alternative, that the case should be remanded to the District Court to receive proof on the issue of compliance with the provisions of Section 15 and the Civil Service Regulations implementing that Section.

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MARCH 1951.

APPENDIX

A. Statute

The pertinent portions Sections 2, 7, 8, 9, 11, 12, 13, and 15 of the Veterans' Preference Act of 1944, Act of June 27, 1944, c. 287, 58 Stat. 387 (as amended July 26, 1947, c. 343, 61 Stat. 501; January 19, 1948, c. 1, 62 Stat. 3; July 2, 1948, c. 816, 62 Stat. 1233; August 26, 1949, c. 513, 63 Stat. 666; 5 U. S. C., Supp. III, 851, and 5 U. S. C. 856, 857, 858, 860, 861, 862, 864), provide:

> Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans'

Administration, the Department of the Army or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions; * * *

* * * * * *

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating: *Provided,* That, except for positions in the professional and scientific services for which the entrance salary is over $3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the top of the appropriate civil-service register or employment list, in accordance with their respective augmented ratings.

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification

of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided,* That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency of such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and considered by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated representative upon request therefor: *Provided, further,* That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification

of his name for appointment may thereafter be discontinued, prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-service register from which they were originally appointed, whenever there are substitutes of the required sex who are eligible and will accept, unless such vacancies are filled by transfer or reinstatement.

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this Act.

* * * * *

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose

efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

SEC. 13. Any preference eligible who has resigned or who has been dismissed or furloughed may, at the request of any appointing officer, be certified for, and appointed to, any position for which he may be eligible in the civil service, Federal, or District of Columbia, or in any establishment, agency, bureau, administration, project, or department, temporary or permanent.

* * * * * *

SEC. 15. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by

any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

B. Regulations

The pertinent portions of the Civil Service Regulations, 5 CFR (1949) Parts 2, 7, 20 and 21, provide:

* * * * *

PART 2—APPOINTMENT THROUGH THE COMPETITIVE SYSTEM

* * * * *

§ 2.107 *Eligible registers.* (a) The names of persons who qualify in competitive examinations shall be entered on appropriate registers in the order of their ratings, as may be augmented by veteran preference, subject to apportionment, residence, or other requirements of law or the Commission's regulations.

(b) When an eligible register has been established as the result of open competitive examination, the names of the following classes of persons may be entered thereon, provided they have a competitive status:

(1) Persons declared eligible by the Commission after appeal from separation

under section 14 of the Veterans' Preference Act;

(2) Veterans who have been furloughed or separated without delinquency or misconduct, or who have resigned from the service, and applied for reentry of their names on such register.

Application for entrance on a register under this paragraph must be filed within 90 days of separation or failure of restoration or reemployment. Applicants shall be examined under the same standards used in the open competitive examination and their names shall be entered on the register in the order prescribed by paragraph (a) of this section.

(c) (1) Veterans who were in the armed forces of the United States subsequent to May 1, 1940, and for that reason lost eligibility on a register during a period that the register was used for probational appointment, shall have their names entered on the appropriate successor register if they:

(i) Have been honorably separated from the armed forces;

(ii) Are still qualified to perform the duties of the position for which the register is used; and

(iii) Make application for entrance on the register within 90 days after separation from active service or from hospitalization continuing after discharge for a period of not more than one year. Such persons shall be restored to the successor register, for the life of such register, in accordance with their former ratings as augmented by preference points, except as provided in subparagraph (2) of this paragraph.

(2) Persons who establish eligibility for entrance on a successor register in accordance with subparagraph (1) of this paragraph, shall have their names entered at the top of the appropriate group on the successor register if another person standing lower on the register on which their names formerly appeared was given a probational appointment from such register. For the purpose of determining the appropriate group all 10-point veterans including such restored veterans, will be considered as one group, and all other eligibles including such restored 5-point veterans, as another group. However, for professional and scientific positions for which the basic entrance salary is over $3,000 per annum, all eligibles will be considered as one group.

(3) Persons who meet the conditions for entrance on a successor register in accordance with subparagraphs (1) of this paragraph shall have their names listed for certification for probational appointment if no successor register exists and another person standing lower on the register on which their names formerly appeared was given a probational appointment from such register.

(4) A person having eligibility under subparagraphs (2) or (3) of this paragraph who, due to disability incurred because of military service in World War II, is unable to perform the duties of the position designated by him at the time of taking the examination for appointment thereto, may upon written request at any time have his name entered upon any list of eligibles for which a like examination is required and shall continue to have the

rights granted by subparagraphs (2) or (3) of this paragraph.

* * * * *

PART 7—REINSTATEMENT

* * * * *

§ 7.101 *General requirements for reinstatement of persons who have competitive status.* (a) A person having a competitive status at the time of separation from the Federal service may be reinstated subject to the following requirements:

(1) Reinstatement must be made within one year of separation if the period of service was less than two years, within two years if the period of service was two years or more but less than three years, within three years if the period of service was three years or more but less than four years, within four years if the period of service was four years or more but less than five years, and without time limitation if the period of service was five years or more.

(2) If separated during his probationary period, reinstatement must be made within one year of separation, but such reinstatement shall be subject to completion of probation and may be made only in the same agency, locality, type of position, and same or lower grade for which he meets the training and experience requirements, except that a probationer separated through reduction in force may be reinstated in any agency and to any position in any locality if he meets the qualifications standards for promotion or reassignment to the position.

(3) Veterans may be reinstated without regard to any time limitations specified in this section.

(4) The qualifications standards of the Commission for promotion or reassignment to the position must be met.

* * * * *

§ 7.104 *Agency authority for reinstatement.* (a) The Commission hereby delegates authority to agencies to reinstate any person who meets the requirements of § 7.101 except where a certificate of the Commission is required by § 7.103 (a), or prior approval must be obtained in cases falling under § 7.103 (b).

(b) The Commission may disapprove any reinstatement, or suspend or withdraw this authority whenever, after postaudit, it finds that the regulations in this part have not been followed.

* * * * *

PART 20—RETENTION PREFERENCE REGULATIONS FOR USE IN REDUCTIONS IN FORCE

* * * * *

§ 20.3 *Retention preference*—(a) *Classification.* For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

Group A: All employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of 30 days or more. With respect to positions excepted from the Civil

Service Act and rules, this includes all status and non-status employees currently serving in excepted positions under appointments without time limitation, or all employees who transferred from absolute or probational appointments in the competitive service to war service indefinite or trial period excepted appointments.

A–1 Plus during one-year period after return to duty, as required by law.

A–1 With veteran preference unless efficiency rating is less than "Good".

A–2 Without veteran preference unless efficiency rating is less than "Good".

A–3 With veteran preference where efficiency rating is less than "Good".

A–4 Without veteran preference where efficiency rating is less than "Good".

Group B: All employees serving in positions in the competitive service without competitive status or serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B–1 With veteran preference unless efficiency rating is less than "Good".

B–2 Without veteran preference unless efficiency rating is less than "Good".

B–3 With veteran preference where efficiency rating is less than "Good".

B–4 Without veteran preference where efficiency rating is less than "Good".

Group C: All employees in the competitive service serving under appointments with definite time limitations imposed in accordance with § 2.114 (c) of this chapter, or in accordance with specific authority of the Commission, all employees in the

excepted service with definite time limitations of one year or less, all noncitizen employees serving within the continental limits of the United States, its territories or possessions, all employees continuing beyond the automatic retirement age, and all annuitants appointed under section 2 (b) of the Civil Service Retirement Act, as amended.

C–1 With veteran preference unless efficiency rating is less than "Good".

C–2 Without veteran preference unless efficiency rating is less than "Good".

C–3 With veteran preference where efficiency rating is less than "Good".

C–4 Without veteran preference where efficiency rating is less than "Good".

* * * * *

§ 20.8 *Sequence of selection.* Within each competitive level, action must be taken to eliminate all employees in lower subgroups before a higher subgroup is reached, and within each subgroup of retention groups A and B, action must be taken concerning all employees with a lower number of retention credits before an employee with a higher number of retention credits is reached, except as provided below. Action may be taken at administrative discretion within any subgroup of retention group C. Whenever two or more employees are tied for position in retention group A or B, the ties shall be broken first by considering half years of service in excess of total years for which retention credits were granted, and then by giving consideration to such matters as official conduct, or established administrative policy.

* * * * *

PART 21—APPOINTMENT TO POSITIONS EXCEPTED FROM THE COMPETITIVE SERVICE

§ 21.1 *Extent of regulations*—(a) *Positions covered.* The regulations in this part shall apply to all positions (1) in the executive branch of the Federal Government that are excepted from the competitive service; (2) in any temporary or emergency establishment, agency, bureau, administration, project, and department created by acts of Congress or Presidential Executive order which are excepted from the provisions of the Civil Service Act of January 16, 1883; and (3) in the civil service of the District of Columbia. Positions excepted from the competitive service include all positions excepted from the provisions of the Civil Service Act of January 16, 1883, by statute or Executive order, including positions listed in Part 6 of this chapter, positions which may be filled by persons under personal service contract, and positions in Government owned or controlled corporations. The civil service of the District of Columbia includes all positions in the Government of the District of Columbia, and positions under the Board of Education and the Board of Library Trustees of the District of Columbia.

(b) *Applicability.* The provisions of the regulations in this part respecting the examination, rating, and selection for appointment of applicants are required to be followed whenever a qualified person entitled to preference under § 21.2 applies for consideration for appointment. Such provisions may be followed, in the discretion of the agency, in making appointments when no preference applicant applies.

§ 21.2 *Persons entitled to military preference.* In actions taken under the regulations in this part, five-point military preference or ten-point military preference as specified in section 3 of the Veterans' Preference Act of 1944 shall be granted to those persons specified in section 2 of that act. Separation under honorable conditions, as used therein, shall mean any separation from active duty in any branch of the armed forces under honorable conditions. A transfer to inactive status, a transfer to retired status, the acceptance of a resignation, or the issuance of a discharge will be considered as covered by the above definition if such separation was under honorable conditions.

§ 21.3 *Receipt of applications; uniform treatment.* Each agency shall establish definite rules regarding the acceptance of applications for employment in positions covered by the regulations in this part. Such rules shall be made of record in the agency and shall be uniformly applied to all persons who meet the conditions of such rules. Information regarding the rules shall be furnished upon request.

* * * * *

§ 21.5 *Examination of applicants*—(a) *Rating.* The agency may provide for an evaluation of the qualifications of all applicants for a position, who are available under §§ 21.3 and 21.4 at any time prior to appointment being made to such position. Numerical ratings shall be assigned on a scale of 100 and all applicants rated 70 or more shall be eligible for appointment: *Provided,* That no numerical ratings need be assigned whenever all qualified applicants will be offered immediate appointment: *Provided further,* That

whenever there is an excessive number of applicants, only a sufficient number of the highest qualified applicants to meet the anticipated needs of the agency within a reasonable length of time need be given numerical ratings; in such cases the agency shall adopt procedures which will insure consideration of all preference applicants in the order in which they would have been considered if all applicants had been assigned numerical ratings. To the earned numerical ratings of applicants entitled to five-point preference, five points shall be added and to the earned numerical ratings of applicants entitled to ten-point preference, ten points shall be added. A notice of the rating assigned shall be furnished upon request.

No consideration shall be given the application of any non-preference applicant, nor shall such application be rated, for the positions of elevator operator, messenger, guard and custodian as long as qualified applicants entitled to preference are available for such position.

Whenever experience is a factor in determining eligibility, an applicant entitled to five-point or ten-point preference under the regulations in this part shall be credited with time spent in the military or naval service of the United States when the position for which he is applying is similar to that he held immediately prior to his entrance into the military or naval service; credit shall also be given such applicant for all valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether any compensation was received therefor.

§ 21.6 *Maintenance of employment lists*—(a) *Establishment of lists.* All ap-

plicants assigned eligible numerical ratings in accordance with § 21.5 shall have their names entered on either (1) the appropriate reemployment list or (2) the appropriate regular employment list. The names of all such applicants shall be entered on said lists in accordance with their ratings, except that the names of applicants entitled to five- or ten-point preference under the regulations in this part shall be entered on such lists in accordance with their respective augmented ratings, and the name of a preference applicant shall be entered ahead of all others having the same rating: *Provided,* That except on lists of applicants for professional and scientific positions for which the basic entrance salary is over $3,000 per annum, the names of applicants entitled to ten-point preference under the regulations in this part shall be placed at the top of the appropriate lists.

(b) *Reemployment list.* The reemployment list will consist of the names of former employees of the agency who are to be considered for future employment, and shall, in any case, include the following:

(1) The names of former employees of the agency entitled to preference under the regulations in this part who have been furloughed or separated without delinquency or misconduct and who apply for reemployment.

(2) The names of any former employees of the agency entitled to preference under the regulations in this part who are found by the Commission, in accordance with § 21.10, to have been unjustifiably dismissed from the agency.

(c) *Regular employment list.* Eligible applicants assigned numerical ratings who are not entered on the agency reemployment list shall be entered on the regular employment list.

(d) *Order of consideration.* (1) The names of all applicants who are assigned eligible numerical ratings for a given position shall, except as provided below for professional and scientific positions for which the basic entrance salary is over $3,000 per annum, be considered either in Order A or in Order B, below:

(i) Order A: (a) The names of qualified applicants entitled to ten-point preference under the regulations in this part whose names appear on the agency reemployment list, in the order of their numerical ratings.

(b) The names of all other qualified applicants entitled to ten-point preference under the regulations in this part in the order of their numerical ratings.

(c) The names of all other qualified applicants on the agency's reemployment lists in the order of their numerical ratings.

(d) The names of all other qualified applicants in the order of their numerical ratings.

(ii) Order B: (a) The names of qualified applicants entitled to ten-point preference under the regulations in this part whose names appear on the agency reemployment list, in the order of their numerical ratings.

(b) The names of all other qualified applicants on the agency's reemployment list, in the order of their numerical ratings.

(c) The names of all other qualified applicants entitled to ten-point preference under the regulations in this part in the order of their numerical ratings.

(d) The names of all other qualified applicants, in the order of their numerical ratings.

(2) The names of all applicants assigned numerical eligible ratings for professional and scientific positions for which the basic entrance salary is over $3,000 per annum shall be considered in the following order:

(i) The names of applicants on the agency's reemployment list, in the order of their numerical ratings.

(ii) The names of all other applicants, in the order of their numerical ratings.

§ 21.7 *Selection and appointment*—(a) *Selection.* In making appointments from employment lists the agency shall make selection for appointment to each vacancy from not more than the highest three names available for appointment in the order provided in § 21.6 (d): *Provided,* That the agency need not accord eligibles on the agency reemployment list the preferential consideration provided in that section for such eligibles if such list contains the names of less than three applicants entitled to preference under the regulations in this part: *Provided further,* That the agency need not consider any applicant who has previously been considered three times, nor any preference applicant who has been disqualified under the provisions of paragraph (b) of this section. The second and any additional vacancies shall be filled in like manner.

(b) *Passing over a preference applicant.* Whenever an agency in making a selection of a nonpreference applicant in accordance with paragraph (a) of this section passes over the name of a preference applicant who, under § 21.6 (d), is entitled to prior consideration, it shall record its reasons for so doing.

A copy of such reasons shall, upon request, be sent to the preference applicant or his designated representative.

When, in making appointments to a position, an agency has on three occasions passed over the name of a preference applicant and recorded its reasons for so doing, consideration of his name for such position may thereafter be discontinued.

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U. S. GOVERNMENT PRINTING OFFICE: 1951